

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

In the matter of:)	
)	
FITZPATRICK, Claudia Y.F.,)	
)	
Debtor.)	Case No. 05-30204
)	
ROBERT LEE SMITH,)	
)	
Plaintiff,)	
)	
vs.)	Adv. No. 05-03030
)	
CLAUDIA Y.F. FITZPATRICK,)	
)	
Defendant.)	

Montgomery, AL
January 31, 2006, 9:33 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE WILLIAM R. SAWYER
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

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Proceedings recorded by electronic sound recording;
Transcript produced by transcription service.

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1 (CALL TO ORDER)

2 THE COURT: Please be seated.

3 COURTROOM DEPUTY: Adversary case number 05-3030, Smith
4 versus Fitzpatrick.

5 THE COURT: Good morning. Mr. Smith.

6 MR. SMITH: Yes, sir.

7 THE COURT: Good morning, sir.

8 MR. SMITH: Good morning.

9 THE COURT: And let's see. Mr. Cavanaugh, you are
10 representing Ms. Fitzpatrick?

11 MR. CAVANAUGH: Yes, Your Honor.

12 THE COURT: All right. Well, as I understand, here
13 what we have got is we have got a complaint to determine the
14 dischargeability of an indebtedness. Let's see. Mr. Smith,
15 you are representing yourself; is that correct, sir?

16 MR. SMITH: Yes, sir. I can't afford an attorney.

17 THE COURT: Okay. Well, I guess the way we will
18 proceed, you just plan to testify yourself?

19 MR. SMITH: I can testify for myself, Your Honor, yes,
20 sir.

21 THE COURT: Okay. I mean, I guess my question was -
22 well, see, it is a little bit awkward. Usually we have got a
23 lawyer and then the client takes the stand and testifies. When
24 basically the client is representing himself, I think the thing
25 to do - now, do you plan to go first or were you going to call

1 Ms. Fitzpatrick first, or how did you want to proceed?

2 MR. SMITH: I can go first, Your Honor.

3 THE COURT: Okay. Well, why don't you gather up
4 whatever papers you are going to want. I see you have got some
5 papers there. If there is anything you want me to look at that
6 you want to put into evidence, take it with you, and we will
7 swear you in and we will let you testify. Or would you rather
8 testify - I guess we could -

9 MR. SMITH: I would be closer to the papers if I stay
10 here probably.

11 THE COURT: Why don't you go ahead and stand and, Mr.
12 Livingston, if you would swear in Mr. Smith.

13 (ROBERT LEE SMITH, WITNESS, SWORN)

14 THE COURT: Okay, Mr. Smith, one thing, you see we have
15 got microphones here. Now, if you would rather just sit and
16 speak into the microphone there at the table, whichever is
17 convenient. What I don't want you to do is wander betwixt and
18 between and that way we will miss what you are saying. So just
19 pick one, either one, whichever is more comfortable for you.

20 MR. SMITH: I think I will sit right here.

21 THE COURT: That's fine. Mr. Smith, the floor is
22 yours, sir.

23 MR. SMITH: Your Honor, this case, Your Honor, as I
24 understand it, is to determine whether or not a debt that I
25 presented to the court is owed to me, whether or not it should

1 be discharged.

2 To begin with, Mr. and Mrs. Fitzpatrick leased a home
3 from me. It was my primary residence they leased from me. I
4 would like to present first as Exhibit 1 a copy of the lease.

5 THE COURT: All right.

6 MR. CAVANAUGH: No objection.

7 THE COURT: Okay. Why don't you just - actually if you
8 have got - why don't you just go through all of your documents
9 and hand them up and then Mr. Cavanaugh can look through them
10 to see if he has any objections.

11 So number one is the lease?

12 MR. SMITH: Yes, sir. It is the lease. And can I just
13 go ahead and talk about the lease a moment or just present the
14 documents first?

15 THE COURT: Well, I guess the thing is - whichever way
16 you think is better. I would kind of prefer to see everything
17 at once. If you think I need context, you can talk about them,
18 but I would kind of like to get a handful of stuff to look at.

19 MR. SMITH: Okay. I have a copy of the lease. That is
20 Exhibit No. 1. I will lay it face down here for a moment.

21 THE COURT: Okay.

22 MR. SMITH: This thing ended up resulting in an
23 eviction on November 6, and I guess you could say it was set
24 aside because of a receipt issue that existed between Mr. and
25 Mrs. Fitzpatrick and I, the landlord. And the judge did,

1 however, because they did not have the receipts for the months
2 in question, did require that they pay the rent for December
3 and - November and December of 2003. And then they instructed
4 her to go ahead, and him, to go ahead and just file a separate
5 suit relating to the receipt issue.

6 So this particular hearing was the hearing that Mrs.
7 Fitzpatrick was present. It was November - the eviction was
8 November 6 and the actual hearing was December 4, 2003. She
9 attended that. Mrs. Fitzpatrick attended that hearing.

10 THE COURT: So there were actually two different
11 lawsuits?

12 MR. SMITH: It is really one lawsuit.

13 THE COURT: One lawsuit, two different hearings?

14 MR. SMITH: Yeah, two different hearings is the way I
15 understand it.

16 THE COURT: All right.

17 MR. SMITH: But the first one was on December 4, 2003,
18 at which Mrs. Fitzpatrick appeared and, to my surprise, I
19 didn't know that - I was evicting them for nonpayment of rent
20 but, when we got in there, I was surprised with a bunch of
21 receipts and the issue became whether or not they had paid
22 ahead rent or paid advanced payments or whatever term Mr. and
23 Mrs. Fitzpatrick might want to use to describe having paid more
24 months than they were in the property according to the lease.

25 THE COURT: Okay.

1 MR. SMITH: So I want to present a kind of working
2 representation of what happened as a result of that first
3 meeting that Mrs. Fitzpatrick attended. I am going to mark
4 this Exhibit No. 2, and it shows everything that happened
5 during that time.

6 MR. CAVANAUGH: Your Honor, I am not sure when he says
7 a working exhibit. I mean, is that some notes that he took or
8 is that -

9 THE COURT: Let's do this. Let's just let Mr. Smith go
10 through his paper work and then, when he has got everything
11 identified, because all we are doing at this point is
12 identifying, and then you can look through it and, if you have
13 objections to anything, we can take it up then. And then what
14 I would prefer to do is simply admit what I can admit, exclude
15 anything if we have got to exclude anything, and then let him
16 tell his story from the documents and then we will switch to
17 your case.

18 So let's proceed that way. It is a little bit awkward
19 because it is always a little bit awkward if you have got - you
20 know, because of the - but I am taking what he is saying right
21 now more in the way of argument or offering documents and not
22 really - and then we will get into the testimony. You are, of
23 course, going to have a right to cross-examine if you choose
24 and then, of course, you will put your evidence on, if any,
25 later on. But what I was going to try to do is get the

1 documents out first and then we will let Mr. Smith give his
2 testimony, tell his side of the story. So let's try to proceed
3 like that.

4 So we have got a lease, we have got some paper work
5 from your state court trial.

6 MR. SMITH: Yes, sir. Judge Givhan was presiding over
7 the trial and she was the one that instructed us, if we had -
8 there was a difference of opinion here about that. She said so
9 we are going to take it and separate it. We are going to make
10 - if you want to file a lawsuit, she told Mr. and Mrs.
11 Fitzpatrick that if you want to file a lawsuit, you can file a
12 separate lawsuit regarding the receipt issue but you are going
13 to have to pay the two months rent that was due as of December
14 4. So that's what happened.

15 And she also instructed them that during the time that
16 - if they filed the lawsuit, that during the time that this
17 lawsuit was being filed regarding the receipts, that they had
18 to keep the rent current. And what happened was in January the
19 rent was not paid on time again in accordance with the lease.
20 I again then filed another eviction action, which I was told I
21 could do. At this point they were evicted by the judge
22 presiding over that hearing.

23 THE COURT: Okay.

24 MR. SMITH: And of course they have a right to an
25 appeal and they appealed it. So when they appealed it, they

1 then instructed them to pay the rent to the court. It was six
2 hundred and fifty dollars a month according to the lease until
3 such time as a trial was had on it, and it went from the
4 District Court to the Circuit Court.

5 This created a real difficult problem for me because
6 I had never been in an appeal or anything like that on an
7 eviction, and the court was holding the money pending the
8 hearing to determine who was telling the truth about the
9 receipts. So I made two or three pleas to the court to at
10 least let me receive the money so I could make my mortgage
11 payments, but they would not hear it. They just set it for
12 trial.

13 What happened at the trial was, the next time we met,
14 Mrs. Fitzpatrick did not appear. Mr. Fitzpatrick appeared by
15 himself. He filed the document regarding the receipts even
16 though it was initially started under both of their names. We
17 went back and forth with that issue with the receipts for
18 probably three to four months, and I think he concluded at the
19 same time that I did that this is going nowhere, it is taking
20 too long, and we both submitted paper work to have the case of
21 the receipts, which was the thing that was keeping the Circuit
22 Court appeal in place, married or combined with the receipt
23 issue, and that's what happened.

24 So in the interim there were at least two or three
25 other hearings we had regarding my effort to try and get them

1 out of the property so I could at least rent the property even
2 though they were keeping the money that had been collected, and
3 one of them was that the lease provided for me to have a right
4 of inspection of the property to see what kind of condition it
5 was in. And it has been my experience that, when there is some
6 kind of dispute between the landlord and tenants about
7 property, the bitterness sometimes results in the property
8 being trashed. So I wanted to at least get a look at the
9 property to see what kind of condition it was in, and I filed
10 an eviction to try and get that done, at least let me get in
11 there or let some representative I might employ get in there,
12 do a walk-through and do some kind of write-up on the status of
13 the property prior to the conclusion of the case.

14 I couldn't get in there to do a walk-through and,
15 needless to say, the property did get turned over to me in a
16 distressed position. It was returned to me in a distressed
17 position.

18 Eventually what happened, Your Honor, was it went to
19 trial. In the interim, I had spent probably three thousand, a
20 little over three thousand, four hundred or five hundred
21 dollars on an attorney initially. When the cost of the
22 attorney got more than the cost of the case for the receipts,
23 at that point I had to let the attorney go. I had paid her
24 more money than the case was about, so I asked her to
25 respectfully step down and let me take my case.

1 And then I went at it very aggressively. Around June,
2 I sent out probably eight, nine or ten interrogatories for
3 questions that I had that I had never gotten answered by my
4 attorney that I had employed to help me with the case. I never
5 got any replies to any of the interrogatories, and I sent them
6 two copies. Since the appeal case was in the name of Michael
7 D. Fitzpatrick and Claudia Y. Fitzpatrick, everything I sent
8 out, I sent it out in duplicates, one to him and one to her,
9 and there was an area in there where I did specify who I
10 thought might be able to answer the question but any one of the
11 two was welcome to answer the questions. None of them were
12 answered, Your Honor, none of the questions.

13 MR. CAVANAUGH: Your Honor, may I interrupt just
14 briefly? I am not sure if these are witnesses for Mr. -

15 UNIDENTIFIED PERSON: No, I am supposed to be here to
16 meet my attorney here. I would like to know is he showing up
17 today in this courtroom?

18 THE COURT: Okay. Do you have any paper work with you,
19 sir?

20 UNIDENTIFIED PERSON: I left it at home. I came down
21 here the last time. It was supposed to be on the tenth and
22 then on the thirtieth of this month.

23 THE COURT: Probably what you are here for is what we
24 call a section 341 meeting of creditors, and that will be - do
25 they do it next-door or two doors down?

1 MR. CAVANAUGH: 4-E usually, Your Honor.

2 THE COURT: Okay. So the courtroom immediately next-
3 door here is where they do the 341 meeting of creditors, sir.

4 UNIDENTIFIED PERSON: Thank you, Your Honor.

5 THE COURT: Thank you, and the other gentleman?

6 MR. SMITH: These three people are all three with me.

7 THE COURT: Are they going to be testifying or are they
8 just here to observe?

9 MR. SMITH: They may be testifying, Your Honor.

10 THE COURT: Okay. Let's do this. I guess your point
11 in asking is you want a separation of witnesses if they are
12 going to testify?

13 MR. CAVANAUGH: Yes, Judge.

14 THE COURT: Okay. Let me explain this, Mr. Smith.
15 Under the rules each party has the right to exclude the
16 witnesses of the other, so that one witness doesn't get to hear
17 what another is saying. Are either of these two gentlemen
18 going to testify?

19 MR. SMITH: Yes, sir.

20 THE COURT: Well, here is what -

21 MR. SMITH: Your Honor, there may be one other person
22 still coming.

23 THE COURT: Okay. What you can do is, gentlemen and
24 ma'am, if you could wait outside. You can either sit in the
25 hallway or there are conference rooms immediately outside the

1 court door if you would prefer to sit in the conference room,
2 but I am going to have to ask you not to wait in the courtroom.

3 I understand. I have testified several times as a
4 witness myself in cases. I always find it dull to have to sit
5 around a conference room to wait until it's my turn.
6 Unfortunately that's just the rule. So if you could either
7 have a seat in the conference room - Bill, do we know -

8 COURTROOM DEPUTY: It is open.

9 THE COURT: So you can use the conference rooms if you
10 would like or, if you would prefer to sit out in the hallway,
11 whichever is more comfortable for you.

12 MR. SMITH: Do you want all of the -

13 THE COURT: Yeah, everybody who will or may testify,
14 so, yes, sir, everybody will need to leave.

15 Have we got all of the documents you want me to look
16 at?

17 MR. SMITH: I have got some more.

18 THE COURT: Okay. What else have we got in the way of
19 documents?

20 MR. SMITH: I did indicate to Your Honor that after the
21 first eviction, they paid, and they got behind again, so they
22 were evicted - I mean, a notice was sent to them again to be
23 evicted and they were evicted. In the letter, it shows that it
24 was dated January 6, and I would like to put it as Exhibit No.
25 3 because it is a procedure of the court, the district court,

1 that you have to send a ten-day letter of notice before you can
2 evict someone.

3 THE COURT: Okay.

4 MR. SMITH: And this document shows that I did what was
5 required by the court with the ten-day notice. This is number
6 three.

7 We went to trial on or about the seventh of September.
8 Now, all of these intermediate hearings - we had two or three
9 intermediate sessions with the receipts and all of the
10 intermediate cases that preceded up to the ultimate case, which
11 was - the case number was CV-04-394. All of these cases
12 according to the court order required that Ms. Claudia Y.
13 Fitzpatrick be present. In other words, all three of us was
14 ordered to come to court for these various events. And after
15 the first one, Ms. Claudia Fitzpatrick did not attend any other
16 events and it appeared to me that she had left the handling of
17 this matter to her husband even though she originally came at
18 the beginning herself with him on this matter.

19 So we had the trial. The ultimate day of the trial
20 for CV-04-394 started with my testimony. After which, Mr.
21 Fitzpatrick was able to ask me some questions, and I think in
22 the interim prior to that I actually called witnesses, some of
23 the people you see that just stepped outside, to testify to
24 various parts of this matter.

25 And then afterward, he took over and spoke and gave

1 his side of the story. There were times in there where we
2 needed testimony from his wife since he was testifying about
3 receipts that supposedly she had paid, but she was not present
4 to testify. So the judge ended up relying on the testimony of
5 Mr. Fitzpatrick. I was not astute enough, since I am not a
6 lawyer, to know that in that case, in the conclusion if I had
7 just said that I would make a motion for default judgment, that
8 we would not be here, a default judgment against Mrs.
9 Fitzpatrick for not showing up and giving her side of the
10 story, but I didn't know that. I just dealt with the issues at
11 hand in front of me.

12 What went on in that trial, Your Honor, I would like
13 to make an exhibit. This is a copy of the transcript that I
14 paid about four hundred and some dollars to get that basically
15 says everything that happened - my testimony, Mr. Fitzpatrick's
16 testimony, anything that the judge may have intervened and had
17 done or said during the time. So I am going to make this
18 Exhibit No. 4, the complete testimony of the trial.

19 When the trial was concluded, the judge took a short
20 recess for probably about a week, and he came back with a
21 decision on it, and I would like to make this decision that the
22 judge made Exhibit No. 5. And this is his order and in his
23 order he says here that the court does not find defendant,
24 Michael Fitzpatrick, to be a credible witness and further finds
25 that the rent was not paid by the defendants, and he said that

1 plural. Defendants, he said, all of them, so I guess that
2 includes him and his wife. And he ordered and referred the
3 matter back to the district court and he ordered the court to
4 abide by his decision. In effect that is what it says. Abide
5 by his decision and to refund any monies that have been
6 collected by the court to me in regard to the matter.

7 So I am going to make this Exhibit No. 5, and I also
8 have - I can attach it to this if you would like since this was
9 associated with the order. I have copies of the checks that
10 they gave me, the two checks that they gave me that equal what
11 they collected. One of the checks was for seven hundred and
12 seventy-three dollars and the other one was for four thousand,
13 five hundred and fifty dollars, and I guess that is the total
14 of what they collected during that time associated with this
15 matter. So his order and the checks that they gave me.

16 He sent the matter back to the district court and they
17 in turn followed through on his instructions and asked Mr. and
18 Mrs. Fitzpatrick to vacate the property. It took a little
19 while for the district court to act on it, so I had to send
20 another letter in requesting that it be done fairly promptly
21 because I was still in distress from not having my property
22 repaired and do whatever needed to be done with it.

23 After that, Your Honor, I had suffered a great deal of
24 loss during this whole period. It lasted about nine months.
25 During that nine month period, I must have been threatened at

1 least four or five times by the bank for the property they were
2 living in, that if I didn't bring my payments current, they
3 were going to foreclose on the property. They even sent back
4 some partial payments I made of fourteen hundred or more
5 dollars because I was behind more than fourteen hundred dollars
6 on the property. So I ended up during that time period having
7 to make choices because this was my home I let them move into.
8 It was a hundred some thousand dollar piece of real estate in
9 east Montgomery. I had several other little properties that
10 were worth twenty-five to thirty thousand dollars. So what I
11 ended up doing was -

12 MR. CAVANAUGH: Your Honor, I realize you are allowing
13 him some latitude to present his documents but it seems like we
14 are getting to the trial in chief.

15 THE COURT: I understand.

16 MR. CAVANAUGH: I really haven't had a chance to object
17 to anything he has been saying.

18 THE COURT: All right. I understand he is testifying
19 in the narrative. Some of what he is saying may arguably be
20 hearsay. What I am going to do is I am going to accept what he
21 is saying as a proffer and we are going to sort it out at the
22 end. I just want to hear his story.

23 MR. CAVANAUGH: Okay.

24 MR. SMITH: Well, as I was saying, I had to make
25 choices. So I went and picked out three or four of the smaller

1 properties if I was going to lose something. I didn't want to
2 lose anything. But if I had to lose something, I didn't want
3 to lose my primary residence. I would much rather lose some
4 smaller rental properties. So I started taking money from the
5 rental properties and paying the payment on this house, this
6 hundred some thousand dollar house they were living in. Of
7 course, there were legal fees involved that I pulled from these
8 houses to do. I mean, I just started pulling money from other
9 houses to finance the lawsuit, to finance the payment of the
10 mortgage, to finance anything that had to be done, and I kind
11 of shuffled it around trying to hold them off, hoping the
12 courts would conclude the matter and I could keep all of my
13 properties, even though I would have been in a financially
14 distressed situation.

15 I lost them. I lost four other pieces of real estate.
16 I also lost my truck. I had a truck that I used to haul all of
17 my stuff in to repair and do work on my houses. I lost the
18 truck, too.

19 Everything was primarily going to the bank to pay the
20 mortgages on all of these houses. When my financial situation
21 got stretched, automatic bank drafts were coming in there,
22 checks were bouncing. I mean, automatic bank draft types were
23 bouncing. In addition to that, I had all of my personal
24 affairs on this account. This was a personal account. And my
25 insurance, my truck payments, my house payments, everything was

1 on this account. My deal was to race to the bank every month,
2 put money in there to cover all of these drafts coming in, and
3 it was always - I had managed in a way that there were always
4 sufficient funds, there was no deficiency. And I had overdraft
5 protection provided by the Alabama State Employees Credit Union
6 to catch anything that, because of the cash flow disturbance,
7 might happen, and there never would be five hundred dollars and
8 I had a five hundred dollar overdraft protection thing on that
9 account.

10 And ultimately the houses went, the truck went,
11 insurance policies lapsed, and I did finally write them. I had
12 about four or five insurance policies, different types, long-
13 term care insurance, hospital insurance, that I have paid in
14 and I have never filed any claims against these places. I have
15 always paid them on-time, automatic bank draft. And I wrote
16 them and I asked them, I said send me copies of how much of the
17 premiums I paid into these things over the past two or three
18 years, and they sent me copies of them showing it. And so part
19 of my claim includes those losses for those lapsed policies,
20 and we are talking in some cases three, four, five, six, seven
21 thousand dollars of premiums that was paid into various
22 policies that all lapsed and I didn't get them back.

23 So when it was over, what I did was the damage was
24 much greater. It was much greater than the three thousand,
25 seven hundred and some dollars they were attempting to get, Mr.

1 and Mrs. Fitzpatrick, in terms of advanced payments or paid-
2 ahead rent. And I went back to the court and I filed an action
3 to try and recover some of this loss, not to mention the fact
4 that the court in my opinion, while it was fair, it was a
5 little bit lenient in the end because I made a motion to
6 dismiss based on the owing of five hundred and some dollars of
7 rent that didn't get paid and I didn't get that, so I included
8 that, too.

9 At that time, I didn't know that Mrs. Fitzpatrick had
10 filed a bankruptcy. I then got notice from her attorney that
11 she had filed a bankruptcy and that I was to discontinue any
12 collection action against her, lawsuit or anything, and I did
13 that. And I instructed the Circuit Court not to do it and a
14 couple of times there it seemed like they were still attempting
15 to do something based on my prior instructions, so I wrote a
16 letter and told them put a piece of paper between me and them,
17 don't do it, don't contact her about any collection.

18 Mr. Fitzpatrick did not take any action to reply to
19 that suit and what happened as a result of it, and I would like
20 to make that Exhibit No. 6, is that I then made a motion to the
21 judge for a default judgment against Mr. Fitzpatrick, and the
22 judge in this exhibit I have, number six, granted that default
23 judgment. He is still awaiting me to submit the dollar
24 amounts, I assume, of what I lost so he can consider that to
25 determine what kind of money he is going to assign to it, but

1 he did issue a default judgment on that, Exhibit No. 6.

2 Then I proceeded to get some assistance in this matter
3 right here in the federal court to undertake pursuing Mrs.
4 Fitzpatrick and, Your Honor, what I see as her aiding and
5 abetting of her husband in this matter because it was easy for
6 Mrs. Fitzpatrick at the beginning of this lawsuit when she did
7 attend the hearing to let the judge know, since she had been in
8 the property, her and her husband, approximately nineteen
9 months - they had receipts there reflecting they had been there
10 maybe twenty-two, twenty-three or more months - to tell the
11 judge that those did not represent paid-ahead rent or advanced
12 payments, but she did not deny the conclusion that was being
13 formulated or drawn regarding those payments being paid-ahead
14 rent or advance payments. And it all centered around a couple
15 or three months. One of those months was the month of March.

16 It has been my practice, Your Honor, with people,
17 helping them when they move into homes, that if they - even
18 though I have a canned lease that basically is already drafted
19 or written up and I give them a copy to review at least two or
20 three days before they sign it, it is my practice that if,
21 because of the moving costs and everything, they have some
22 problem coming up with a security deposit and the first month's
23 rent and having the utilities transferred or whatever, I will
24 allow them to pay, if it is the same, I will allow them to pay
25 the six hundred and fifty dollars if it is a six hundred and

1 fifty dollar property, like in this case, I will allow them to
2 pay the first month's rent and I will give them twelve months
3 to pay the security deposit. They can either pay it in monthly
4 installments or it becomes due and payable in full at the end
5 of the anniversary of the signing of the lease twelve months
6 later.

7 And one of the issues in question in this matter is
8 the payment of the security deposit which twelve months later
9 is being claimed as a paid-ahead rent item or advanced payment,
10 and this was in March. They signed the lease in March. One
11 year anniversary from March, I contacted them by letter and one
12 of the ladies in the wheelchair outside is the one that does
13 all of my typing for these letters and everything. She is here
14 to testify that this item I have here is an item that she
15 typed. And I would like to make this item Exhibit No. 7. And
16 it is dated March 15, Your Honor, and it is an eviction notice
17 being sent to Mr. and Mrs. Fitzpatrick informing them that the
18 anniversary one year in the property has arrived and that the
19 security deposit had not been paid and that, if they did not
20 pay it, they would get a ten-day notice that I was going to
21 take action to evict them from the property.

22 The error that I made when I did that was I allowed
23 them to pay the March rent one year later, due between the
24 first and the fifth, but I didn't ask them to pay all thirteen
25 hundred dollars on the first five days of March one year later.

1 I told them you can take two weeks spread and then pay me the
2 other but it has got to be paid in March.

3 So the letter went out around the fifteenth. They
4 paid me on or about the fifteenth the money for the security
5 deposit, and I just wrote it out as - just by coincidence in
6 this case, the monthly rent was six fifty, the security deposit
7 was also six fifty. And I wrote that out for six fifty and I
8 failed to put the word "security deposit" on it. There was no
9 problem with that, though. I didn't hear anything else about
10 that. I knew what it was for and they knew what it was for.
11 So I didn't have a problem with that initially.

12 Then the next month something happened in the house.
13 Something broke or something, and they thought it was going to
14 cost a lot of money. They had to move out of the house
15 temporarily into a hotel. I think it set them back a little
16 bit financially. It was the air-conditioner or something. And
17 they asked me was I going to fix it and I said, "Well, what
18 does the lease call for as far as maintenance?" I knew what it
19 called for. For the first twelve months, in any lease I have,
20 I take care of all maintenance and everything. After the first
21 twelve months, unless it is structural or major expenses, the
22 tenant takes care of the maintenance of the property. And they
23 apparently looked at that and they saw that was the case and I
24 didn't hear anything else about it. I don't think they was too
25 happy about it, though.

1 At any rate, what happened after that was they had
2 been having some problems paying the rent on time even before
3 then. So what I did was I said, "Look, I am making too many
4 trips by here to collect the rent." I said, "While it is not
5 my practice to let you mail it to me because you may say you
6 mailed it and I don't get it," I said, "I am going to go ahead
7 and let you all mail the payment to me." This was in - the
8 security deposit was in March. This was in April and May. So
9 they mailed me the payment the first month. I got it. I
10 turned around and I wrote them a receipt even though they sent
11 the payment by money order for six hundred and fifty dollars.

12 I got a call from Mr. Fitzpatrick saying, "Hey, Mr.
13 Smith," several days later, "Did you get my payment on the
14 rent?" I said, "Yes, sir, I did. I sent you a receipt." He
15 said, "Well, I didn't get one." I said, "Well, give it a few
16 days and, if you don't get it, I will come by the house and
17 write you one." I did that. But the problem was he did get
18 the receipt, and I came by the house and wrote him another
19 receipt. So he had the money order receipt in April and he had
20 two other receipts, the one that I mailed him that he say he
21 didn't get and he had the one that I brought to him.

22 The type of book that I was using at that time, and
23 nobody really before Mr. Fitzpatrick had ever paid much
24 attention to that, and me, because I don't think like that, it
25 is a receipt book that has receipts but it doesn't have a

1 carbon. I haven't been doing this a long time. I just started
2 this rental thing. So when I write a receipt, it doesn't have
3 a prenumber on it, it doesn't have a carbon. So if they say
4 they don't get it, I have got to write them another receipt and
5 now they have got two of them, and that is what happened in
6 this case, and I haven't had this problem with anybody else,
7 and I have changed my receipt book, but Mr. Fitzpatrick
8 apparently noticed that when I was giving him receipts. And
9 later on subsequently it seems like they attempted to take
10 advantage of that.

11 But, at any rate, he ended up with three receipts. He
12 ended up with the money order receipt for six fifty. He ended
13 up with the one I mailed him that he say he didn't get, and he
14 ended up with the one I personally brought by there and gave to
15 him. I still didn't hear anything about that. I didn't know
16 anything was going to come of that later. I didn't even know
17 that had happened.

18 So May comes around. That was March and April, and
19 now they have got that extra receipt that is not marked
20 security deposit. They have got two extra receipts, plus the
21 Postal Service money order they mailed me, and here comes mail.
22 He mails me a payment again. This time he is late and, Your
23 Honor, there is no - at this point in time I don't know he is
24 going to claim these receipts later, him and Mrs. Fitzpatrick.
25 I don't know this because I am thinking that the only receipt

1 they got is the one I took them. So what happens is here comes
2 May and he mails me a payment, seven hundred and five dollars.
3 It was late. The money order was postmarked around the seventh
4 of the month, and the lease says any payment made after the
5 fifth of the month is late and you must pay a ten percent
6 penalty. So the payment should have been for seven fifteen.
7 Well, since I wasn't there personally collecting that money, he
8 was mailing it to me, he sent me a seven hundred and five
9 dollar postal money order. I accepted it. I needed to go
10 ahead and get that payment in to the mortgage company. I
11 wasn't concerned about the five or ten dollars that he didn't
12 send me. I got the majority of the money and I got the basic
13 payment. So I sent him a receipt.

14 Now, from the time I get that money out of the mailbox
15 to the time I run to the bank and deposit it or send it off if
16 I have already done been to the bank, it may be two or three
17 days. The one thing that I do know in my mind when I got that
18 was he met the minimum requirement. He paid the minimum of six
19 fifty, plus the late fee, and I don't really get to keep the
20 late fee because I have to pay late fees to the bank and
21 anywhere else where there is bank drafts gone in and was turned
22 around at thirty, thirty-five dollars. So I don't really count
23 that. So I wrote him a receipt and, in my mind, every payment
24 is due on the first of the month and, if I get it on the
25 seventh or eighth of the month by mail, I write the receipt and

1 I date it for May 1. In this case, it was a May payment, so I
2 put May 1 even though I may have gotten it on May 7, 8, or 9,
3 because he didn't buy the money order until the seventh. But
4 I dated it, six hundred and fifty dollars, paid May 1, and
5 mailed it to him.

6 I got a call from Mr. Fitzpatrick. "Mr. Smith, did
7 you get my payment this month?" I said, "Yes, sir, I did." I
8 said, "I sent you a receipt." He says, "Well, I didn't get a
9 receipt." I said, "Well, Mr. Fitzpatrick, it ain't doing me no
10 good for you to mail the payments if I have to keep coming out
11 here giving you receipts." So I said, "Well, I will tell you
12 what. Give it a day or two. If you don't get your receipt,
13 call me back and I will bring you a receipt." And I did that
14 again in May. And after May when I brought him that receipt,
15 I told him right then, "We are discontinuing this mail thing."
16 I said, "If I have to come four or five times to you and Mrs.
17 Fitzpatrick's house to collect this money, I will have to do it
18 that way because it is not saving me any gas and time to have
19 to keep coming out here to give you receipts that you say you
20 don't get in the mail." And still nothing had happened but
21 they got the receipts. They got all of these extra receipts
22 now for these three months. The security deposit that was
23 unmarked security deposit when they don't have proof of a
24 security deposit paid at the beginning, they have got it. Two
25 payments in March. They have got the money order, plus three

1 extra receipts in April, and they have got the money order,
2 plus three extra receipts, in May. From that point on, I came
3 around and collected the money again. Everything went
4 smoothly. They were late a time or two but they still paid me
5 and I got it.

6 Come around November, Mr. Fitzpatrick got hurt or
7 something, had an accident. When he got hurt, they couldn't
8 make the payments, and I told him, I said, "This is the worst
9 time of the year to have this problem." I said, "I will work
10 with you any time of the year but I have got too many tenants
11 that's having problems during Christmas and can't pay their
12 rent because they want to do Santa Claus." I said, "You have
13 got to get it. If you have to borrow from family or somebody,
14 you need to get it."

15 I gave him long after the ten days. I didn't file the
16 eviction letter until around the tenth - I mean around the
17 fifteenth of the month to have him evicted out of the house,
18 and that is when they surprised me with this incident.

19 So basically what happened, that was the issue about
20 the receipts. When we went to court, the rest of the testimony
21 is history in here.

22 THE COURT: Okay.

23 MR. SMITH: But Judge Hobbs heard the case and, when he
24 heard that case, Judge Hobbs was convinced, after listening to
25 my testimony and Michael Fitzpatrick's testimony, that he did

1 not pay the receipts. He shifted and changed his story two or
2 three different times during the case and the judge was just -
3 after that, he didn't want to hear any more of it. In that
4 testimony, one of the things that he said was - in this
5 transcript - was that the way he acquired the receipts - first,
6 he said he paid them off.

7 THE COURT: Why don't you gather up your exhibits and
8 just hand them to Mr. Livingston and then I am going to ask Mr.
9 Cavanaugh to look at them.

10 MR. SMITH: Okay. I am going to put with that exhibit
11 - this one here is the receipts. This is all of the receipts
12 when we started the investigation that Mr. Fitzpatrick had that
13 he said that he had paid, and I will make it Exhibit No. 7.

14 COURTROOM DEPUTY: Is that eight?

15 MR. SMITH: Is it eight?

16 COURTROOM DEPUTY: I believe it is eight.

17 MR. SMITH: Okay. And I am going to put this exhibit
18 somewhere in the middle here. This is all of the receipts that
19 I know of that they had.

20 Now, Your Honor, I want to say one thing. Do you want
21 me to pick all of these up and give them to Mr. Cavanaugh?

22 THE COURT: Yeah, why don't you hand them to Mr.
23 Livingston.

24 MR. SMITH: The only other time, Your Honor - now,
25 those are all of the receipts that I know of that Mr.

1 Fitzpatrick had that he presented to court. Now, the only
2 other opportunity I know that he may have tricked me out of a
3 receipt, and it has never been presented, he kept increasing
4 the number of receipts that he had as the story kept changing,
5 is if he seized the opportunity to have gotten a receipt at
6 some other time when I came with the -

7 THE COURT: Let's do this now. These are Exhibits 1
8 through 7. Mr. Cavanaugh, if you would take a minute and come
9 up and look and see if there is any objections you want to make
10 to any of those.

11 (Pause)

12 MR. CAVANAUGH: Your Honor, the only two - the ones I
13 would be objecting to are, first of all, the motion for default
14 judgment with regards to Robert Lee Smith and Michael
15 Fitzpatrick he granted on 9-20-05, filed on the sixteenth of
16 September, 2005, inasmuch as I don't see the relevancy of the
17 default against Mr. Fitzpatrick in the case here before the
18 bankruptcy court.

19 THE COURT: Okay. Well, can you hand that one to Mr.
20 Livingston, and you said you have an objection to another
21 document?

22 MR. CAVANAUGH: And then with regards to Exhibit 5 and
23 4, which basically - it is a little bit complicated. We
24 actually had four hearings. We first had a district court
25 hearing where Mr. Smith filed in November of 2003 for eviction

1 against Mrs. Fitzpatrick and her husband, Mr. Fitzpatrick. I
2 think in his proffer Mr. Smith alluded to that where Judge
3 Givhan basically dismissed it without prejudice but ordered the
4 Fitzpatricks to go ahead and pay the November and December
5 rent, which basically brought them current, ignoring all of
6 this dispute about receipts, et cetera, brought them current
7 through December 31 of 2003. And as Mr. Smith said, with the
8 proviso that they were to keep their rent current. And as Mr.
9 Smith's proffer, Mrs. Fitzpatrick was there at that December,
10 I think, 4th hearing, 2003.

11 THE COURT: Let's just do this. Let's not get into any
12 more long, convoluted argument. We have got seven or eight
13 exhibits which are offered; is that correct?

14 MR. SMITH: Yes, Your Honor.

15 THE COURT: You are objecting to six. Are you
16 objecting to anything else other than six?

17 MR. CAVANAUGH: No, actually I am objecting to five and
18 four. These are -

19 THE COURT: So you are objecting to three of the six?
20 Four, five and six is what you object to?

21 MR. CAVANAUGH: Yes, Your Honor.

22 THE COURT: Okay. So Exhibits 1, 2 and 3 can be
23 admitted without objection. Four, five and six, I am going to
24 simply hold under advisement. I just want to hear the rest of
25 what is going to go on today. I mean, I think, for example, I

1 am looking at six. I think your objection is well taken on six
2 as to whether or not it is relevant. The cause of action, I
3 keep reminding myself, is a 523(a)(2). We are not really re-
4 trying the eviction proceedings from state court here except to
5 the extent that they may have some - there may be some
6 background relevance. So I am kind of struggling with that.
7 So I am simply going to take under advisement your objections.
8 I am going to go ahead and allow - we have got Exhibits 4, 5
9 and 6 are marked for identification purposes. They are
10 offered, and I will simply withhold -

11 MR. CAVANAUGH: Also No. 7, receipts, let me just
12 object to them for right now until Mr. Fitzpatrick testifies
13 and Mr. Smith testifies and there is a proper predicate.

14 THE COURT: All right. That is fine. Bill, why don't
15 you go ahead and take those back, put them in order, and then
16 you can take six here also.

17 All right. So we have got your documents. Mr. Smith,
18 I think I have heard your story. Is there anything else you
19 wanted to offer?

20 MR. SMITH: Yes, sir. In the documents, one or two of
21 them they objected to, particularly the transcript, was Mr.
22 Fitzpatrick's testimony regarding his wife having paid some of
23 the receipts. Now, what he said was this: He told the judge,
24 he said this: That my wife and I were having some problems. She
25 put me out of the home and, in an effort to gain her favor, I

1 was continuing to work and pay the rent and Mr. Smith was going
2 by the house and also collecting rent. That is his explanation
3 for how the May, the April payments became what they were.

4 What I did, Your Honor, during the discovery of this
5 case was I sent some questions to Mrs. Fitzpatrick and I asked
6 her, I said, "Can you tell me, Mrs. Fitzpatrick, is there any
7 time during the term of the lease that you moved out of the
8 house?" Her answer was, "No." I then asked her, "Was there
9 any period of time during the term of the lease that Mr.
10 Fitzpatrick moved out of the house?" Her answer was, "No." So
11 that testimony - and I have got it here - the answers to her
12 interrogatories, question number two, shows direct conflict
13 between the testimony in the transcript of Mr. Michael
14 Fitzpatrick and the testimony of his wife regarding the
15 vacating of him from the home, and he said she put him out, and
16 she said she did not, to the best of her knowledge, he was
17 never out of the home. Certainly if his wife had put him out,
18 she would recall that she had put him out. So his explanation
19 of how they acquired the extra receipts is in direct conflict
20 with her testimony regarding the receipts.

21 Mrs. Fitzpatrick also testifies in the questions to
22 interrogatories I asked her, was, "Did you at any time
23 communicate or coordinate with your husband regarding the
24 payment of the rent?" Her answer to me in the interrogatories
25 was -

1 MR. CAVANAUGH: Your Honor, I am again going to have to
2 object to -

3 THE COURT: Right. I agree with you a hundred percent.
4 We are getting pretty far afield. What I want to do is I want
5 to give Mr. Smith about five more minutes to finish up his
6 story. I am kind of struggling through the relevance problem.
7 Perhaps there may be some hearsay issues in there, but I just
8 want to go ahead and hear the rest of that. We have been going
9 for almost fifty minutes. I have heard your story out. If
10 there is anything that you haven't told me yet, you need to
11 tell me now because we are getting to the point here where we
12 are going to close the plaintiff's case and then we will hear
13 from the defendant.

14 MR. SMITH: I don't know how far out I will be going,
15 Your Honor, but -

16 THE COURT: Well, here is the thing. I am feeling like
17 we are re-living the whole landlord/tenant relationship. I
18 mean, I have heard that. But, you know, we are here in a fraud
19 case in bankruptcy court and you have offered the trial
20 testimony. You have told me your side of the story. Is there
21 anything further that you need for me to consider? I just
22 can't let you ramble all day on who said what and when. You
23 know, we need to get to the point.

24 Is there anything further that you would like for me
25 to consider?

Fitzpatrick - Direct

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1 MR. SMITH: Not at this time, Your Honor.

2 THE COURT: Okay. Thank you. All right. Then we will
3 treat the plaintiff as having rested. Mr. Cavanaugh, do you
4 want to offer anything or what is your preference?

5 MR. CAVANAUGH: I would like to call Mrs. Fitzpatrick
6 just briefly to the stand.

7 THE COURT: Okay. That is fine.

8 (CLAUDIA FITZPATRICK, WITNESS, SWORN)

9 DIRECT EXAMINATION

10 BY MR. CAVANAUGH:

11 Q. Mrs. Fitzpatrick, with regards to the hearing or
12 initial eviction action that we had the hearing on December 4,
13 2003, in front of Judge Givhan, do you recall that hearing?

14 A. Yes.

15 Q. Okay. Were you present at that hearing?

16 A. Yes.

17 Q. Okay. Did you in any way testify at that hearing?

18 A. No.

19 Q. Did you make any statements at all about receipts or
20 anything of that nature?

21 A. No.

22 Q. Now Judge Givhan required or the court required that,
23 since you all could not provide proof of the November and
24 December payments, were you all to pay the November and
25 December payments; is that correct?

Fitzpatrick - Direct

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1 A. Yes.

2 Q. And were those payments made?

3 A. Yes.

4 Q. So up until December 31, you all were, 2003, current
5 with the rent; is that correct?

6 A. Yes.

7 Q. Now Mr. Smith filed a second eviction action in
8 January or he sent a ten-day letter on January 6 and filed a
9 second eviction action on January 21, at which they had a
10 hearing in front of Judge McLemore on February 11, 2004. Were
11 you present at that hearing?

12 A. No.

13 Q. Well, obviously you did not make any statements then?

14 A. No.

15 Q. Likewise, your husband subsequent - Judge McLemore,
16 or the court at that point ruled in favor of Mr. Smith for the
17 eviction action. Did your husband subsequently file an appeal
18 to Circuit Court?

19 A. Yes, he did.

20 Q. Did you in any way file any type of appeal to Circuit
21 Court?

22 A. No.

23 Q. And during the time awaiting the appeal, to your
24 knowledge were the rent payments being made to the court on a
25 timely basis?

Fitzpatrick - Direct

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1 A. Yes.

2 Q. You heard about the hearing that Mr. Smith testified,
3 the Circuit Court appeal which apparently was consolidated with
4 the lawsuit that was brought by your husband against Mr. Smith
5 that occurred on September 7 in front of Judge Hobbs 2004.
6 Were you present at that hearing?

7 A. No.

8 Q. Did you make any type - well, you obviously did not
9 make any type of statements in that regard?

10 A. No, I did not.

11 Q. The hearing when you were evicted from the house at
12 that point, you heard Mr. Smith talk about damages briefly.
13 Were there any abnormal damage to the house when you all
14 vacated the house?

15 A. There were no damages, nothing to the walls, the
16 carpet, anything like that. The house was like it was when we
17 moved in. It was like -

18 Q. You didn't intentionally try to damage the house or
19 any of that nature?

20 A. No.

21 Q. And likewise he has alleged in his complaint that
22 part of the problem occurred for you not allowing him to come
23 and inspect the premises. Did he ever come to you personally
24 to inspect the premises during the time you were occupying the
25 leased property?

Fitzpatrick - Cross

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1 A. No.

2 Q. Did you ever turn him away from the - you, yourself,
3 ever turn him away from the leased property?

4 A. No, I never turned him away.

5 MR. CAVANAUGH: No further questions.

6 THE COURT: Okay. Mr. Smith, are there any questions
7 that you would like to ask?

8 MR. SMITH: Yes, Your Honor.

9 THE COURT: All right.

10 CROSS EXAMINATION

11 BY MR. SMITH:

12 Q. Mrs. Fitzpatrick, at any time did you communicate or
13 coordinate with your husband regarding the payment of the rent?

14 A. No, not all the time.

15 Q. I beg your pardon.

16 A. No, not all the time.

17 Q. In an earlier interrogatory when I asked you that
18 question, you gave an absolute no, you did not communicate or
19 coordinate with him regarding the rent.

20 A. Not all the time. I mean, it was just some time, not
21 the majority of the time.

22 Q. Did you and Mr. Fitzpatrick have a pet of any kind
23 that lived in the home?

24 A. No.

25 MR. SMITH: Your Honor, I have copies of a cat that,

Fitzpatrick - Cross

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1 when I took possession of the home, every time I opened the
2 door, the cat ran in the house. And at the time when I took
3 the house back, the carpet cleaners noticed blood in one of the
4 closets that looked like -

5 MR. CAVANAUGH: Your Honor, we would object. He is
6 testifying.

7 THE COURT: All right. Well, let's just do this: My
8 recollection was the question is did you have a cat and I think
9 you said, no; is that correct?

10 THE WITNESS: Right.

11 THE COURT: Then what I am going to let you do is I am
12 going to let you very briefly in your rebuttal case, if you
13 want to give testimony, but Mr. Cavanaugh is correct, it is not
14 appropriate just because you disagree with an answer for you to
15 start giving your side of the story. I will give you a short
16 time to do a rebuttal case. If you think it appropriate to
17 offer that testimony, you can do it then. Why don't you just
18 simply move on and ask, if you have got any other questions for
19 Mrs. Fitzpatrick. This is a standing objection.

20 BY MR. SMITH:

21 Q. Mrs. Fitzpatrick, when you did attend the first
22 eviction hearing, was any of the receipts in that group of
23 receipts that Mr. Fitzpatrick, your husband, gave to the judge,
24 Givhan, were they receipts that you gave him?

25 A. Some of the receipts in there were for me.

Fitzpatrick - Cross

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1 Q. Okay. So does that mean that you did understand and
2 you and Mr. Fitzpatrick had communicated regarding the matter
3 of there being more receipts than there was months that you had
4 resided in the property?

5 A. No.

6 Q. No, what?

7 A. No, we didn't have a communication, you know, about
8 that. All I know is when you came by the house and you wanted
9 to collect the rent, I gave you the money and that was it.

10 Q. Did you know at the time you are alleging that I came
11 by the house and collected money that Mr. Fitzpatrick's
12 testimony is that he also had paid me money?

13 A. No.

14 Q. So you all never discussed whether or not you paid
15 the rent or he paid the rent each month?

16 A. No.

17 Q. And arbitrarily from month to month sometime, you
18 would just pay the rent without ever talking to your husband
19 about it?

20 A. Yes.

21 Q. Who kept the receipts?

22 A. He did.

23 Q. Has there ever been any time when you would pay the
24 rent at a location other than your home?

25 A. No.

Fitzpatrick - Cross

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1 Q. Was it your understanding when Judge Givhan took
2 those receipts and she looked at the lease and she counted the
3 number of months from the time the lease was signed to the time
4 of the hearing and the fact that there was more receipts there
5 than there was months that you had been in the property, did
6 you conclude that there were some excess receipts there?

7 A. No.

8 Q. Did you understand her when she said there was more
9 receipts there than there was months that you had been in the
10 property?

11 A. Yes, I understood.

12 Q. But you didn't understand that those receipts
13 represented excess number of payments made on the house?

14 A. No.

15 Q. What did you think?

16 A. Really I just left that up to Michael because he
17 handled all of that. You know, he told me that he didn't want
18 me communicating with you, that he wanted to communicate with
19 you as far as paying the rent and all of that. So I didn't
20 know what was going on.

21 Q. But as far as drawing a conclusion yourself mentally
22 about the number of months in the house versus the number of
23 receipts, you didn't have any conclusion that that meant
24 possibly that there were more payments made than there was
25 number of months in the house?

Fitzpatrick - Cross

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1 A. No.

2 Q. Was there any time that you received any kind of
3 communications from me, you and Michael Fitzpatrick, requesting
4 in accordance with the lease that I, or an agent I would
5 employ, be allowed to come in and to inspect the property.

6 A. Repeat that again.

7 Q. Was there any time during the terms of the lease that
8 you and Mr. Fitzpatrick received a request, a notice from me,
9 requesting that I be allowed or an agent that I would select to
10 come by the home and do an inspection of the property?

11 A. No.

12 MR. SMITH: Your Honor, I do have a copy of an item
13 that was sent to Mr. and Mrs. Fitzpatrick. I would like to make
14 that the next exhibit. I will have to put my fingers on it,
15 but I did send them a letter -

16 THE COURT: If you have a copy of it, you can show her
17 and ask her if she has any recollection of having received the
18 letter. I will allow that.

19 MR. SMITH: Your Honor, I can't put my fingers on that
20 letter at this moment.

21 THE COURT: What we are going to do, then, is if you
22 have got any final questions for Mrs. Fitzpatrick, you can ask
23 them. Then what we will do is we will let Mr. Cavanaugh ask
24 any redirect if he has any questions. We will break for just
25 a few minutes and I will give you just a couple of minutes to

Fitzpatrick - Cross

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1 look to see if you can find it and then we will hear your
2 rebuttal case if you want to put anything on, and then we will
3 wrap it up.

4 So do you have any more questions for Mrs.
5 Fitzpatrick?

6 MR. SMITH: Yes, sir, I may have one or two.

7 THE COURT: Okay.

8 BY MR. SMITH:

9 Q. Mrs. Fitzpatrick, why did you not attend the hearings
10 even though you were ordered by the court to attend?

11 THE COURT: Well, now, wait a minute. First of all, I
12 suspect she wasn't ordered to attend. Second of all, we have
13 got nothing in the evidence to show that she was ordered to
14 attend. Third, that is argumentative. You have got to really
15 ask her a question. She gave some testimony and I understand
16 your questioning some of that but you are trying to testify
17 through the witness and that is just not going to work.

18 So I am going to give you a few minutes to rebut their
19 case but what I have got to ask you to do now is you have just
20 got to ask her questions, and I understand, you know, that you
21 may not accept some of the answers but you are kind of stuck
22 with that for the time being. You have just got to ask her
23 whatever you want to ask her and I am not going to give you an
24 opportunity for you to give your testimony or your reasons as
25 to why you think things that she may be testifying to is

Fitzpatrick - Cross

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1 incorrect. So you need to just confine yourself to asking her
2 anything further you want to ask her.

3 BY MR. SMITH:

4 Q. Mrs. Fitzpatrick, you say you did give your husband
5 some of the receipts that was presented to Judge Givhan. Which
6 receipts did you give him?

7 A. I can't recall at this time. I can't recall the
8 dates.

9 Q. Were any of those receipts for advanced payments or
10 paid-ahead rent?

11 A. No.

12 Q. Was any of them late payments?

13 A. No.

14 MR. SMITH: That's all I have, Your Honor.

15 THE COURT: All right. Thank you. Mr. Cavanaugh, any
16 redirect?

17 MR. CAVANAUGH: No redirect, Your Honor.

18 THE COURT: Thank you, ma'am. You may step down. Mr.
19 Cavanaugh, is there anything else you wanted to offer?

20 MR. CAVANAUGH: No, Your Honor.

21 THE COURT: Okay. Here is what we are going to do. We
22 are going to break for about five minutes. Mr. Smith, that
23 will give you a little bit of time to look for that letter you
24 had said, also get your thoughts together if there is anything
25 else.

1 MR. SMITH: Can I call my witnesses at that time?

2 THE COURT: What are they going to testify to?

3 MR. SMITH: One of them who is the professional typist
4 is going to testify to the documents that Mrs. Fitzpatrick said
5 she never received that I sent to her.

6 THE COURT: Well, are these the documents here that you
7 have already offered into evidence?

8 MR. SMITH: They are just some documents that I still
9 have here.

10 THE COURT: That you have not offered them yet?

11 MR. SMITH: Yes, because I didn't know at the time,
12 based on her testimony, which ones I was going to need to
13 introduce.

14 THE COURT: Well, here is what I want you to do. I
15 don't think Mr. Cavanaugh is going to dispute that these
16 documents were typed up. So -

17 MR. SMITH: The other testimony is testimony of
18 witnesses regarding what has been my - since we are talking
19 about the receipts and the security deposit, what has been my
20 practice with allowing the tenant to pay the security deposit
21 twelve months later.

22 THE COURT: Okay. To the extent that is relevant, I
23 suspect that is not going to be really disputed. So I will let
24 you just proffer that. Let's do this: We are going to break
25 for five minutes. I want you to go through your paper work.

1 If there is anything else you think needs to be offered, then
2 go ahead and offer it. If there is any other testimony you
3 want to give, we are going to do that, but we are not just
4 going to relive the landlord/tenant relationship. We are in
5 bankruptcy court here. We have got a complaint to determine
6 the dischargeability of an indebtedness and we are going to try
7 to stick to that and, at times, I think we have wandered pretty
8 far afield. So we are going to try to stick closer to what we
9 have got to do here.

10 So we will break for five minutes and then I will hear
11 again from you, Mr. Smith.

12 (Recess from 10:36 p.m. until 10:49 p.m.)

13 THE COURT: We are here on the Smith versus
14 Fitzpatrick. We have heard the case in chief from both
15 plaintiff and defendant. We are now in the plaintiff's
16 rebuttal case. Mr. Smith, just to let you know, we don't redo
17 the whole thing but, if there is any points you think are
18 particularly important, particularly if you think - you
19 remember one of the things you asked Mrs. Fitzpatrick a
20 question and then you started wanting to offer something to
21 show that you disagreed with what she said and I kind of cut
22 you off. Well, now is the time if you want, if that is a point
23 you want to pursue, that's the kind of thing you can follow-up
24 with now.

25 MR. SMITH: Yes, sir. Your Honor, I do have pictures

1 I would like to present into evidence.

2 THE COURT: Okay.

3 MR. SMITH: One of them in particular shows the cat
4 running away from the house.

5 THE COURT: How many photographs do you have there?

6 MR. SMITH: I have twelve of them.

7 THE COURT: Okay. So we are going to have Plaintiff's
8 Exhibit 8 is an array of twelve photos. Is that the number we
9 are on?

10 COURTROOM DEPUTY: Eight, right.

11 MR. SMITH: The other thing I would like to introduce
12 here now is, Your Honor, Mrs. Fitzpatrick testified that she
13 didn't keep the receipts and that she didn't know what months
14 that she gave him the payments for. I did take the receipts
15 and put them in an order and that order -

16 THE COURT: Now you have already offered some copies of
17 receipts, I believe; is that correct, sir?

18 MR. SMITH: Yes, but they were not in order. They were
19 just receipts given to me, scattered all about, and I organized
20 them in accordance to what months they represented.

21 THE COURT: I see.

22 MR. SMITH: And when I did that, what I found was they
23 are showing in March of 2003 that they paid thirteen hundred
24 dollars. The rents for that month, plus they are saying an
25 extra payment which I am claiming was a security deposit. In

1 April, they are saying that they paid six hundred and fifty
2 dollars three times. One thousand, nine hundred and fifty
3 dollars in April. They are also saying that in May they paid
4 two thousand, five dollars. For a total in ninety days of five
5 thousand, two hundred and fifty-five dollars.

6 It was represented to me that Mrs. Fitzpatrick was a
7 teacher's assistant, I think was the term she used, teacher's
8 assistant. And Mr. Fitzpatrick said that he was a truck driver
9 but I understand later he had stopped driving trucks and he was
10 working in the food service business. So they are saying in a
11 ninety-day period they paid five thousand, two hundred and
12 fifty-five dollars for rent.

13 MR. CAVANAUGH: I am going to object. We didn't
14 testify to that. This is rebuttal and he is trying to offer
15 additional evidence that is not appropriate for rebuttal
16 purposes.

17 THE COURT: Okay. Let's start with Exhibit 8, the
18 array of twelve photographs. Have you looked at those, Mr.
19 Cavanaugh?

20 MR. CAVANAUGH: Yes, sir.

21 THE COURT: Any objection to those?

22 MR. CAVANAUGH: No objection, Your Honor.

23 THE COURT: Okay. So Exhibit 8 is admitted. Now as
24 far as Mr. Smith's testimony about this five thousand, two
25 hundred and fifty-five dollars, I mean that is just testimony.

1 That is not an exhibit. I mean, that is testimony you are
2 offering?

3 MR. SMITH: Yes.

4 THE COURT: Okay. So here is what I am going to do.
5 Why don't you just make a note of that. I will let you cross-
6 examine him on that point if you choose to.

7 MR. SMITH: The other thing, Your Honor, is in Mrs.
8 Fitzpatrick's testimony she said that, if I recall correctly,
9 that she received no correspondence from me regarding a request
10 to her and her husband to inspect the property. I have a
11 letter dated here November 20, 2003, with a copy I set up
12 called a suggested quick and easy response sheet requesting to
13 gain entry to the property for an inspection. This is dated
14 November 20, 2003, and then -

15 THE COURT: But does that really relate to what we are
16 doing here today?

17 MR. SMITH: Her testimony was that if I had asked her
18 to come in, if I had come and asked them to gain access to do
19 a walk-through inspection, that they would have let me do it.

20 THE COURT: I recall her testimony that you are making
21 reference to. I see there is a difference between what you are
22 saying and what she is saying, but does that really matter?
23 Does that really relate to your cause of action here? I mean,
24 I thought we were talking about the business about the multiple
25 receipts.

1 MR. SMITH: Well, I just wanted to clear that up and -

2 THE COURT: Well, I appreciate that.

3 MR. SMITH: These are the documents that I sent to them
4 and these are the documents that I took action on in an attempt
5 to evict them.

6 THE COURT: Okay. Why don't you go ahead and mark
7 those, then.

8 MR. SMITH: For breach of contract because they signed
9 a lease saying they would allow the inspection.

10 Now, another thing she testified to was that she
11 always paid me at the house, that she never paid me any other
12 place.

13 THE COURT: Right. I do recall that testimony.

14 MR. SMITH: I do have a document here. It wasn't sent
15 to them but it was a document that was sent to counsel when I
16 had one, and in this document I make reference to the fact that
17 she did pay me occasionally and that the meeting place for
18 paying me was near my home at the time and that was the
19 Hardee's on the corner of Lower Wetumpka Road and Johnson
20 Avenue in Montgomery.

21 THE COURT: Okay.

22 MR. SMITH: So this letter was dated February 19, 2004,
23 making reference to the fact that she did pay me at a place
24 other than home and, whenever I am paid at someplace other than
25 home, it is because the payments are late. It is not because

1 of advance payments. I come to the house between the first and
2 the fifth and, if they don't pay me when I come, then they have
3 to bring the payment to me. So the payment she made in most
4 cases were payments that she brought to me at a meeting place
5 we agreed on which was the Hardee's on the corner of Lower
6 Wetumpka Road and they were late payments.

7 THE COURT: Okay.

8 MR. SMITH: This document shows that. The other thing
9 is, Your Honor, the receipts for May that shows the seven "o"
10 five, if you look at it, it negates all of the other receipts
11 because it was an attempt by Mr. and Mrs. Fitzpatrick to send
12 the payment and include the late fee, seven "o" five when it
13 should have been seven fifteen. Now if they had already paid
14 in March an extra payment and if they had already paid two
15 extra payments in April, there would be no need, even if they
16 wanted to send a payment extra in May, to send a seven "o" five
17 payment. Do you see what I am saying?

18 THE COURT: Yes, sir.

19 MR. SMITH: So that would mean that everything ahead of
20 that must have not been what they say it was if they was
21 attempting to pay a late fee because it would not have mattered
22 when they paid the payment in May extra, it would not have been
23 late, it would have been early.

24 THE COURT: Okay.

25 MR. SMITH: So I am saying the seven "o" five payment

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1 really shows that all of the other claims ahead of the seven
2 "o" five payment were not correct, they were not true, because
3 there was no need to pay seven "o" five if in fact they had
4 paid all of those months ahead in March and April, is what I am
5 trying to say.

6 I think in a nutshell, Judge Givhan put it best when
7 she said, and she referred this case, she would not rule on it.
8 She referred it to the Circuit Court even though we requested
9 it be sent there because it was taking so long. Her remarks
10 was, and I would like to submit this into evidence, she sent
11 this copy to both of us. She said that I was - the defendant
12 is represented by an attorney. The court finds that the issue
13 of the rent receipts of the defendant is on appeal to the
14 Circuit Court, which is the same issue at bar with the Circuit
15 Court issue. The Circuit Court issue was convict them and they
16 had appealed it. And Judge Givhan is saying these two things
17 are so interwoven that you can't deal with the eviction without
18 dealing with the receipt issue because that is what is holding
19 the - the glue that is holding this together, is that they say
20 they paid advanced payments. And so Mrs. Fitzpatrick's
21 representation with her husband on the first meeting of the
22 receipts in fact put her intact with whatever happened after
23 that regarding the eviction. Her representation then followed
24 through all the way through to the end when the judge finally
25 decided that it was not true what they were saying and that

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1 they should move out of the property and I should get the
2 money.

3 So she represented at the very beginning with her
4 husband and she did never - she never denied it. She never
5 ever denied the conclusions that were being drawn by Judge
6 Givhan or anyone else that the payments were not paid-ahead
7 rent and they were not advanced payments. She never denied
8 that. She simply sat there, stood, and gave her husband the
9 receipts and remained silent regarding the conclusions that
10 were being drawn about that. And throughout this testimony -

11 THE COURT: I think you have made that point. I recall
12 you gave some testimony in your case in chief on that. I
13 understood that.

14 Mr. Cavanaugh, do you have any questions for Mr. Smith
15 in the way of cross-examination simply on, of course, what he
16 has given us in his rebuttal case?

17 MR. CAVANAUGH: Just one.

CROSS EXAMINATION

18
19 BY MR. CAVANAUGH:

20 Q. Mr. Smith, when you are talking about Givhan's order
21 or you are offering to present, that is the order on Mr.
22 Fitzpatrick's lawsuit against you that was filed in December;
23 is that not correct? It was not the eviction hearing that you
24 all had in December or it is the lawsuit that Mr. Fitzpatrick
25 filed against you in her court on December 23 that Mrs.

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1 Fitzpatrick is not a party of?

2 A. That's not correct.

3 Q. But the hearing that you all had, the eviction
4 hearing, that one was dismissed without prejudice once Mr. and
5 Mrs. Fitzpatrick paid the November and December payments,
6 bringing them current; was it not?

7 A. The eviction of November 6 was dismissed, yes.

8 MR. CAVANAUGH: No other questions.

9 THE COURT: Okay. I will give everybody one last
10 chance just to sum up very briefly what you think you have
11 shown. Mr. Smith, in five minutes or less if you would like to
12 tell me what you think the evidence has shown and what
13 conclusions you think I ought to draw from it.

14 MR. SMITH: Your Honor, I think that the best point I
15 can make is that, granted, the November 6 eviction once they
16 paid the rent was set aside but then they defaulted again on
17 January 6 and, on January 6, it was an eviction again and,
18 during that time, the receipt issue was still the issue, the
19 driving force in this whole process. It was the issue.

20 Even though Mr. Fitzpatrick presented the receipts,
21 the receipts reflected the receipts that Mrs. Fitzpatrick also
22 claimed she paid. So without the receipts that Mrs.
23 Fitzpatrick is claiming that she paid, then the five thousand,
24 some hundred dollars of extra money would not have been there.

25 THE COURT: Wait a minute. Okay. I am sorry.

1 MR. SMITH: So what I am saying is, had it not been for
2 the receipts that Mrs. Fitzpatrick also gave her husband in
3 representing the receipt issue, there would not have been the
4 reflection or the appearance of advance payments. So in that
5 regard, she assisted, aided and abetted her husband in
6 presenting the appearance to the court that these were
7 overpayments, paid-ahead rent, advanced payments or whatever
8 term describes paying more rent than is required in accordance
9 with the lease. And she never denied it when the court acted
10 on that. She maintained silence when she should have clarified
11 it, you know, as a matter of record that they were not advanced
12 payments.

13 So in that regard, she assisted her husband. She
14 never came forward and testified to clear that matter and clear
15 the air and, as a result, her husband ended up having to keep
16 shifting his story back and forth trying to convince the judge
17 and have it make sense and, in spite of all of that, he was
18 unable to do that.

19 Now, the key is this: Had Mr. Fitzpatrick been
20 successful, the checks that I received and everything shows
21 that the payment would have been made to Michael and Claudia
22 Fitzpatrick, just like the check that I received reflected
23 payment to me for prevailing in this case from Michael and
24 Claudia Fitzpatrick. It was not from Michael Fitzpatrick. It
25 was from Michael and Claudia Fitzpatrick. So she stood to

1 benefit by her actions of not clarifying and clearing up the
2 matter and, in that regard, I feel that she is just as
3 responsible as Michael Fitzpatrick. She stayed in the home the
4 entire time. She did not move out of her home, which gives the
5 appearance that she felt that she was correct and her husband
6 was correct and he was doing what was in the best interest and
7 correct for the both of them.

8 So, I mean, like I say, the only thing that caused us
9 to be in this court today after the representation made in the
10 state court is the fact that I am not an attorney and I failed
11 to use the words in the closing that I would like to make a
12 motion to have a default judgment issued against Ms. Claudia
13 Fitzpatrick.

14 THE COURT: All right. Thank you, sir. Mr. Cavanaugh.

15 MR. CAVANAUGH: Your Honor, I think the key thing, the
16 plaintiff is basically traveling again under 523(a)(2)(A) for
17 money or property by false pretenses. As his own testimony and
18 Mrs. Fitzpatrick's testimony that at the eviction hearing in
19 November or December of 2003, Mrs. Fitzpatrick made no
20 statements, Judge Givhan obviously did not completely believe
21 Mr. Fitzpatrick because he ordered them to pay the November and
22 December payments since they couldn't prove they paid the
23 November and December payments. So as of December 31, Mr.
24 Smith had suffered no harm.

25 He then filed the second eviction action in January of

1 2004. Mrs. Fitzpatrick did not even attend that eviction
2 hearing. Mr. Fitzpatrick lost at that hearing. The court
3 order, he then appealed, which is his legal right to appeal the
4 district court for a trial *de novo* at Circuit Court, posted the
5 bond. Thereafter made the payments to Mr. Smith through the
6 court.

7 Now, granted, the court might or might not have
8 released it and I am not sure what Mr. Smith could or could not
9 have done during that time frame to get his money but both of
10 the Fitzpatricks were making the payments during that time
11 frame. Mr. Smith was really not suffering any damages.

12 At the hearing in front of Judge Hobbs in September
13 '04 at the Circuit hearing, again Mrs. Fitzpatrick did not
14 appear, did not make any statements, did not do any type of
15 fraud. So, again, under the only section that I think the
16 plaintiff could be traveling under on 523, there is no false
17 pretenses that he is relying upon that caused him any type of
18 loss.

19 With regards to - you know, he had some other accounts
20 about some damage to property. Again, under 523, I think -
21 again, Mrs. Fitzpatrick denied having a cat. Whether you have
22 a cat or not, I don't think that would rise to the level of
23 willful and malicious injury of the debtor or the property - I
24 mean by the debtor of another entity or the property of an
25 entity. So I don't think Mr. Smith has carried his burden on

1 either one of those grounds.

2 THE COURT: All right. Well, thank you both. I think
3 the case has been well tried. I am going to take it under
4 advisement. We will get a written decision out. You can
5 expect it - I will plan to have it out in less than thirty
6 days. So you will be getting the decision in the mail.

7 Thank you both.

8 (Off the record at 11:09 a.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the electronic sound recording of the proceedings in the
above-entitled matter.

Patricia Basham, Transcriber

Date: March 20, 2006